United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 4, 2009

TO : Rosemary Pye, Regional Director

Region 1

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: International Association of EMTs & Paramedics

(American Medical Response) 536-2581-0160 Case 1-CB-10785 536-2581-3384

596-0420-5500

This case was submitted for advice as to whether the Respondent Union violated its duty to fairly represent a grievant by failing to bring his grievance to arbitration after the Union was decertified. We conclude that the instant charge is time-barred because the grievant knew of the Union's refusal outside the Section 10(b) period, and, in any event, based on extant Board law, the Union's position was not so irrational as to constitute arbitrary conduct in violation of its duty of fair representation.

FACTS

Charging Party Joseph Duschka worked for American Medical Response (AMR) as an EMT until his discharge on February 7, 2006, after he arrived late to work in violation of a last-chance agreement. At that time AMR employees were represented by Respondent International Association of EMTs & Paramedics (IAEP). The Union grieved Duschka's discharge, which was scheduled to go to arbitration on October 12, 2006.

In September 2006, 1 AMR employees voted to decertify the IAEP and select a new bargaining representative, the National Emergency Medical Services Association (NEMSA). NEMSA was certified on October 3. Soon afterwards, NEMSA posted a flyer at AMR stations, which announced to unit employees, among other things, that NEMSA would "take possession" of all outstanding grievances and arbitrations. On October 2, IAEP's counsel sent three letters concerning the status of pending grievances and arbitrations in the

¹ All dates are in 2006 unless specified otherwise.

AMR unit. In one letter, the Union informed Duschka that it no longer represented AMR unit employees, that it had prepared his case file for transfer to NEMSA, and that a NEMSA representative would be contacting him to reschedule arbitration. In a second letter, the Union informed the American Arbitration Association that in AMR arbitrations the Union would no longer be the IAEP because IAEP no longer represented AMR employees. The Union further stated that NEMSA is now responsible for all matters relating to those cases. In its third letter, the Union forwarded to NEMSA files in all the outstanding arbitration cases, including Duschka's.

On October 11, the day before the scheduled arbitration was to take place, AMR's counsel wrote the arbitrator to argue that the grievance should be administratively closed because IAEP's disinterest in representing Duschka effectively constituted a withdrawal of the grievance. Duschka states that on this day he learned that no one was intending to appear at the hearing on his behalf; he asserts that a NEMSA representative told him that it was the IAEP's responsibility to take the grievance to arbitration, not NEMSA's. An advocate for Duschka wrote to AAA to request a postponement of the arbitration in order to give him time to secure "replacement" representation. On October 13, a NEMSA agent wrote to AAA to state that it intended to discuss with AMR each of the outstanding cases between the decertified Union and AMR (including Duschka's) and furthermore that it would take appropriate steps to schedule or reschedule arbitration if they were not otherwise resolved.

In November 2006, Duschka filed separate Section 8(b)(1)(A) charges against both NEMSA and IAEP alleging that the Unions unlawfully refused to take his case to arbitration. On November 30, the IAEP wrote to the Region, copying Duschka, stating that the Union "is neither obligated nor permitted to continue the representation of Mr. Duschka [and that] NEMSA specifically notified AMR employees that it was taking possession of all outstanding

² In the charge against IAEP, Case 1-CB-10678, Duschka alleged that, "[s]ince 10/11/06, the above named union failed to represent Joe Duschka in an arbitration hearing re: termination for arbitrary reasons."

grievances" The letter further stated that Duschka's case had "not [been] abandoned," and that the Union "did not withdraw the request for arbitration[,] so the case remain[ed] pending [and] fully viable." While the investigations were pending, NEMSA assured Duschka that it would represent him, up to and including arbitration. Accordingly, in December 2006, Duschka withdrew charges against both Unions. The withdrawal of the NEMSA charge was conditioned on NEMSA's satisfaction of its promises made in this private settlement agreement; the withdrawal of the charge against IAEP was unconditional.

On March 2, 2007, the arbitrator ruled that NEMSA lacked the authority as IAEP's successor to compel AMR to arbitrate Duschka's case because the operative grievance-arbitration provision was set forth in a contract between AMR and IAEP alone. Duschka learned of the arbitrator's ruling in the spring of 2007; he filed the instant unfair labor practice charge on August 8, 2007.

ACTION

We conclude that the instant charge is time-barred because the Charging Party knew outside the Section 10(b) period of the Union's refusal to go forward with arbitration in light of its decertification. In any event, based on extant Board law, the Union's position was not so irrational as to constitute arbitrary conduct in violation of its duty of fair representation.

Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The 10(b) limitation period does not commence until the charging party has "clear and unequivocal notice" of a violation of the Act.³ The Board requires only that a charging party has "knowledge of the facts necessary to support a ripe unfair labor practice."⁴

 $^{^{3}}$ See, e.g., <u>A & L Underground</u>, 302 NLRB 467, 469 (1991).

⁴ See St. Barnabas Medical Center, 343 NLRB 1125, 1127-28 (2004) (union was aware long before the start of the Section 10(b) period of each element of the alleged unfair labor practice, and made an informed and conscious decision not to file an unfair labor practice charge at that time), quoting Leach Corp., 312 NLRB 990, 991 (1993), enfd. 54

In this case, the 10(b) period began to run on the date the Charging Party had knowledge of the Respondent's refusal to represent him at an arbitral hearing. We conclude that the Charging Party clearly knew of (and acted upon) the Union's refusal to represent him at arbitration by no later than November 2006, well outside the Section 10(b) period. In Ohio & Vicinity Regional Council of Carpenters (The Schaefer Group), 5 the Board dismissed as time-barred under Section 10(b) a charge alleging that the respondent union committed a DFR violation by refusing to obtain the employer's compliance with an arbitral award. In early 2000, a union representative had informed the charging party that the union did not intend to enforce a favorable arbitration award. On February 25, 2000, the charging party sent a letter to the Board's Regional Office, in which he complained that the union had refused to enforce the award and requested that the Board investigate the employer. The charging party conceded that he chose not to file a charge against the union at that time despite its refusal to compel the employer to comply with the arbitral award, because he feared that the union might retaliate against him. The Board held that the Section 10(b) period began to run no later than February 25, when the charging party had clear knowledge that the union would not seek enforcement of the award. The Board found that the charging party's conscious decision not to file a charge against the union, despite being on notice of the union's adverse position, established the element of knowledge of the alleged unfair labor practice - more than six months before he eventually filed the charge. 6

F.3d 802 (DC Cir. 1995). See also <u>Linden Maintenance Corp.</u>, 280 NLRB 995, 996 (1986) (indicating that Section 10(b) period began to run on an unfair representation claim when an employee was clearly informed that his grievance would be abandoned).

⁵ 344 NLRB 366 (2005).

⁶ See also <u>St. Barnabas Medical Center</u>, 343 NLRB at 1127-28 (union acted "at its own peril" when it made informed and conscious decision not to file unfair labor practice charge until after 10(b) period elapsed).

Here, Duschka similarly knew that the IAEP had repeatedly refused to represent him at arbitration well before the 10(b) period began to run on February 8, 2007. On October 2 and again on November 30, 2006, the Union announced that only NEMSA had the obligation to represent Duschka at an arbitral hearing. In its second letter, the Union articulated its rationale: that after its decertification, it had no legal obligation to continue to represent unit employees at any forum, including arbitration, and, in fact, might have been legally precluded from doing so. Despite its clearly stated position, Duschka unconditionally withdrew his unfair labor practice charge against the Respondent based on NEMSA's promise to take his case to arbitration. Duschka did not decide to withdraw the charge against the IAEP based on any representations or promises that the Respondent would resolve the situation. To the contrary, the Union's adverse position was clear and unwavering. Thus, like the Charging Party in St. Barnabas, Duschka "made [his] decision not to act at [his] own peril."7 Consequently, we conclude that complaint here is barred by Section 10(b).

Furthermore, and notwithstanding the Section 10(b) hurdle, we conclude that the Union's refusal to arbitrate was not so unreasonable as to violate Section 8(b)(1)(A). A union breaches its duty of fair representation "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside 'a wide range of reasonableness' ... as to be irrational." Any subsequent examination of a union's performance must be highly deferential. 10

 $^{^{7}}$ 343 NLRB at 1128.

⁸ <u>Vaca v. Sipes</u>, 386 U.S. 171, 190 (1967).

⁹ Air Line Pilots Assn. v. O'Neill, 499 U.S. 65, 67 (1991), quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

 $^{^{10}}$ General Truck Drivers Local 315 (Rhodes & Jamieson), 217 NLRB 616, 618 (1975) (grievance processing case), enfd. 545 F.2d 1173 (9th Cir. 1976).

In light of the above, the IAEP's refusal after decertification to represent Duschka at arbitration would constitute unlawful arbitrary conduct only if its motivating belief that it has no such obligation under Board law is "irrational." The current state of Board law does not support that conclusion. In Government Employees Local 888 (Bayley-Seton Hospital), 11 the Board held that a union did not violate its duty of fair representation by refusing to process unit employees' grievances after it was decertified. Although the Board commented that "inferences could be drawn" from then-extant Board law that could be construed as obligating a union to continue to process grievances filed before decertification, "none of the [Board] decisions spoke directly to the question of a replaced union's duty of fair representation in such circumstances."12 Accordingly, contrary to the judge and vacating its earlier decision, the Board concluded that the state of the law in this regard was "unclear" at the time the union made its decision eight years prior and thus that the union's refusal to proceed with the grievances was not so unreasonable as to constitute a DFR violation. 13 Speaking to the present state of the law, a panel majority (then-Member Higgins and then-Chairman Gould) specifically declined to rule that such a DFR obligation running against an ousted union in fact exists. 14 Subsequently, the Board has had no cause to clarify the issue. 15 Thus, the Board's

^{11 323} NLRB 717 (1997), vacating 308 NLRB 646 (1992).

 $^{^{12}}$ <u>Id</u>. at 721.

¹³ Ibid.

 $^{^{14}}$ <u>Id</u>. at 722 n.34 (Higgins; assuming arguendo obligation exists); <u>id</u>. at 722 n.35 (Gould; expressing no view of existence of obligation).

¹⁵ In a more recent case, the Board held that a union that had requested unit information but subsequently disclaimed interest in representing the unit still deserved the information because the Bayley-Seton Hospital case "suggest[s] that the Union may still have a duty of fair representation." Falcon Wheel Division, LLC, 340 NLRB 315,

decision in <u>Bayley-Seton Hospital</u>, and specifically, the panel majority's refusal to state whether a DFR actually exists, remains the state of the law. In these circumstances, we conclude that the Union did not act in an irrational or arbitrary way by construing extant Board law in the manner it did.

Accordingly, for the above reasons, the instant charge should be dismissed, absent withdrawal.

B.J.K.

^{317 (2003) (}emphasis supplied). The Board's equivocal language falls short of imposing such a duty.